"If you park your car in the street you are liable to get into trouble with the police. On the other hand, you are entitled to park your car in places indicated by the police or the appropriate authorities for the purpose. Parking a car is leaving a car and, I should have thought, nothing else."

To my mind a distinction can be drawn between "waiting" and "parking" in a public street. When I remain in my stationary car in Batu Road I am waiting there. If I get out and go into a shop leaving my car there I am parking my car. The essential difference between "parking" and "waiting" in a public street appears to me to be that a car is parked when the person who has control over it is absent from the vehicle. When a vehicle is "waiting" a driver is always at hand to move it should it be likely to cause any obstruction. A parked car is always a waiting car, but a waiting car in a public street is only a parked car when the driver is absent from the vehicle.

On the facts of this particular case it is possible that the appellant failed to comply with the lawful order of a police officer by refusing to remove his vehicle. He may also have obstructed the highway with his car but I am satisfied that he did not park his car because he was still in it and in control of it. He waited in the car. Parking in Batu Road was prohibited, not waiting, and the appellant was therefore not guilty as charged.

I therefore allowed the appeal and ordered that the fine be repaid to the appellant.

Appeal allowed.

Solicitors: *Lovelace & Hastings.*

TEOH CHENG SUM & ANOR. v. ANG AH CHEONG

[A.C.J. (Rigby J.) October 22, 1958]

[Penang — Civil Appeal No. 9 of 1958]

Landlord and Tenant — Express prohibition against sub-letting — Whether a sub-tenant can be affected by Order of possession made without notice to him — Control of Rent Ordinance, 1956, s.19(1)(a) — Meaning of words "or has had an opportunity of being heard" appearing in s.19(1)(b) of the Control of Rent Ordinance.

The brief facts of this case were that on December 10, 1956, the appellants, as the landlords of No. 49-H, Weld Quay, Penang, obtained an order in the Sessions Court, for possession against the then tenants, Tong Lee Hin Ltd., under section 12(1)(b) of the Control of Rent Ordinance, 1956, on the ground that rent lawfully due was more than 14 days in arrears. The tenant appealed against that order and obtained a stay of execution pending the determination of their appeal. Their appeal was dismissed on November 2, 1957.

On December 19, 1957, the present appellants obtained an Order for execution of the judgment including an order that the bailiff of the Court do enter upon the premises and deliver up the vacant possession thereof to the present appellants. When the bailiff sought to execute the order he found the present respondent in possession of part of the premises.

On December 30, 1957, the present respondent filed a Notice of Objection to the Execution Order. In that Notice he claimed to be a lawful sub-tenant of part of the premises from the former tenants, that he was not in arrears with his rent, and he, therefore, claimed to be (or to have become) a statutory tenant of the appellants as landlords (on the termination of the lease of the head tenants, Tong Lee Hin Ltd.).

The learned President of the Sessions Court found as a fact that there was an express prohibition against sub-letting. The respondent was not a party in the original proceedings between the landlord and tenant when the Eviction Order was made.

The short, but important practical point for the consideration of the Court was, whether the words "or has had an opportunity of being heard" appearing in section 19(1)(b) of the Control of Rent Ordinance are restricted to "an opportunity of being heard" in the original proceedings between the landlord and tenant when the Eviction Order was made, or whether they are intended to include proceedings, such as the present, where objection has been taken to a proposed execution of the order for eviction as against the chief tenant, and the sub-tenant on such objection, in truth and in fact "has had an opportunity of being heard."

Held: (1) applying the principles enunciated in *Soon Kooi Hun v. R. Chindan*(1) and *Tan Joo Eng v. Siang Heng Co. Ltd.*(2) which refer both to the procedure to be followed in the lower Courts and in the High Court by a sub-tenant affected by an order for possession of which he had no notice and no opportunity of being heard in the proceedings in which such order was made, the alternative words "or has had an opportunity of being heard" contained in section 19 (1)(b) are intended to afford an opportunity to a sub-tenant to appear and to be heard at any stage before the Order for recovery of possession is enforced against him and are not restricted to an opportunity of being heard before the Order for recovery of possession was made. It is for him then to show, if he can, that he is a lawful sub-tenant and entitled to the protection of the Control of Rent Ordinance or, in the words of Whyatt, C.J. "entitled to retain possession on any other ground";

(2) in the present case the learned President having found as a fact that there was an express prohibition against sub-letting, whatever rights the respondent might have had against his chief tenants he had clearly acquired no rights as a lawful sub-tenant as against the landlords. He could not, therefore, avail himself of the protection of the Control of Rent Ordinance or any other grounds entitling him to retain the possession.

Cases referred to:—

(1) *Soon Kooi Hun v. R. Chindan,* (1954) M.L.J., 247.

(2) *Tan Joo Eng v. Siang Heng Co. Ltd.* (1957) M.L.J. 18.
(3) *Lim Boon Hiok v. Loke Wan Tho,* (1955) M.L.J. 21.
(4) *Ng Eng Kang v. R. Sitharam & Anor.* (1952) M.L.J. 155.

MAGISTRATE'S CIVIL APPEAL.

R. D. Hume for the appellants.

Sir Husein Abdoolcader for the respondent.

Cur. Adv. Vult.

Rigby J.: This is an appeal from a decision of Mr. B. J. Jennings, the then President of the Sessions Court, Penang, upholding an objector's claim in certain execution proceedings brought to recover the possession of certain premises, to wit, No. 49-H, Weld Quay, Penang, pursuant to an Order of the Court made as against the tenants.

[After relating the facts briefly stated in the headnotes above, the learned Judge continued:]

On the hearing of the objection the learned President found the following facts:—

(1) That the respondent and his family had been living in these premises (or part of them) continuously since 1947 as a monthly tenant of the chief tenants, Messrs. Tong Lee Hin Ltd.;

(2) That he had not been in arrears with his rent; and

(3) That he never had any reason to doubt that he was anything else but a lawful sub-tenant. He further found:—

(1) That the appellants, as landlords, were never aware of the sub-tenancy;

(2) That they had good reason to believe that no one but the chief tenants occupied the premises;

(3) That the chief tenants were prohibited from sub-letting without the consent of the landlords in writing; and

(4) That no such consent was applied for.

He further added:—

".....in the circumstances of this case I would not consider a refusal to permit a sub-letting to be unreasonable had permission been asked for."

Section 19 of the Control of Rent Ordinance, 1956, enacts:—

"19. (1) Where any order or judgment for the recovery of possession has been obtained against the tenant of any premises, such order or judgment shall not be enforceable against any such sub-tenant of such tenant unless—

(a) the Court is satisfied that such tenant was prohibited by the terms of his tenancy from sub-letting or that such sub-tenant has used the premises for illegal or immoral purposes; and

(b) such sub-tenant has been made a party to the proceedings or has had an opportunity of being heard.

Every order or judgment for possession made against any tenant shall declare whether it shall be enforceable against any sub-tenant or not.

(2) Any sub-tenant against whom such judgment or order is not enforceable shall, if he remain in possession after notice of the judgment or order has been served on him, cease to be a sub-tenant of the tenant and become a statutory tenant of the landlord in respect of the premises comprised in his sub-tenancy."

Under section 19(1) (a) the learned President was satisfied that Messrs. Tong Lee Hin Ltd. were prohibited by the terms of their tenancy from sub-letting. In his grounds of judgment he stated, however:—

"I hold that the sub-tenant in this case has some protection under section 19 of the Ordinance. The existing order of ejectment would not be enforceable against him — although I am satisfied that sub-letting was prohibited — unless he has been made a party to the proceedings or has had an opportunity of being heard. I hold this to mean that the sub-tenant must be made a party to the ejectment proceedings or be given an opportunity of being heard before the decree for possession is ordered: it would not be enough to give him an opportunity of being heard in these objection proceedings. He was not a party to the ejectment proceedings and he had not been given an opportunity of being heard before the decree for possession was issued. The fact that the landlords were never aware until now of his existence is ignored by section 19. The Order for possession must declare whether it is enforceable against a sub-tenant or not: it does not do so."

The short, but nevertheless important practical, point for consideration is, therefore, whether the words "or has had an opportunity of being heard" appearing in section 19(1) (b) are restricted to "an opportunity of being heard" in the original proceedings between landlord and tenant when the Eviction Order was made, or whether they are intended to include proceedings, such as the present, where objection has been taken to a proposed execution of the Order for eviction as against the chief tenant, and the sub-tenant on such objection, in truth and in fact "has had an opportunity of being heard."

With respect to the learned President I am of the opinion that the alternative proposition as I have stated it is the correct view to take of the section. To my mind, the whole object and intention of paragraph (b) is to give a person claiming to be a lawful sub-tenant, and I emphasise the word "lawful", a right to be heard before the Eviction Order is enforced against him. He can be heard either as a party to the original proceedings or in any subsequent proceedings. Clearly if the landlord is unaware of his existence as a sub-tenant — and particularly where he is a sub-tenant in breach of an express prohibition against sub-letting — he cannot be joined as a party to the original proceedings. He therefore has his remedy — and an opportunity of being heard — by way of objection proceed-

ings if and when the landlord seeks to enforce the Order of eviction as against his tenant. It is for him then, if he can, to establish by way of objection proceedings under Order XXVII rule 5 of the Subordinate Court Rules, 1950, that he is a lawful sub-tenant entitled to the protection afforded by the Control of Rent Ordinance (see the case of *Soon Kooi Hun v. R. Chindan*[1]). The procedure to be followed in the High Court where a sub-tenant is affected by an Order for possession where he has had no prior notice of such Order and no opportunity of being heard in the proceedings in which the Order was made, was considered at length in the case of *Tan Joo Eng v. Siang Heng Co. Ltd. & ors.*[2] The facts of that matter, as indicated by the headnote, were that an appeal was lodged against an Order of the High Court allowing the respondents, who claimed to be sub-tenants, to appear and defend an action for possession under the provisions of Order XII rule 12 of the Rules of the Supreme Court (corresponding to Order XII rule 25 of the present Rules of the Supreme Court, 1957). It appeared that the appellant had obtained an Order for possession in respect of premises, part of which were in the actual possession of the respondents, without making the respondents a party to the proceedings and without giving them any notice. It was argued that the respondents should have proceeded by way of motion to the Court of Appeal to set aside the judgment.

Order XII rule 12 provides:—

"12. Any person not named as a defendant in a writ of summons for the recovery of land may by leave of the Court or a Judge appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or by his tenant."

In considering that Rule Whyatt, C.J., delivering the judgment of the Court stated:—

"Although it might be said that the wording of this rule appears to contemplate that the application for leave should be made before judgment has been given, it was held in *Minet v. Johnson*, (6, T.L.R., 417), that it is wide enough to include an application made after judgment has been signed and even after execution has issued. The practice in such cases is considered in the Annual Practice, 1956, at p. 143, where it is stated that if the application is made after judgment, the applicant should apply *ex parte* for leave to issue a summons to set aside the judgment and to appear, with a stay meantime, and should serve the summons on the plaintiff and the defendant in the action. The procedure adopted by the respondents in this case followed precisely the procedure there laid down in the Annual Practice, and since Order XII rule 12 of the Supreme Court Rules correspond exactly to the English Order XII rule 25, the procedure was, in our view, fully authorised by the Rules and was correct."

Later, in the course of his judgment, he continued:—

"The question whether he can establish a successful defence, either at Common Law or under the Control of Rent Ordinance, is a matter to be inquired into after he has been given leave to appear and has been added as a defendant in the proceedings..... The respondents should be given an opportunity to resist the appellant's claim for possession by showing, if they can, that they are entitled to the protection of the Control of Rent Ordinance or, indeed, that they are entitled to retain possession on any other ground."

Applying the principles of these two cases, which refer both to the procedure to be followed in the lower Courts and in the High Court by a sub-tenant affected by an Order for possession of which he has had no notice and no opportunity of being heard in the proceedings in which such Order was made, it seems to me to be clear that the alternative words "or has had an opportunity of being heard" contained in section 19 (1)(b) are intended to afford an opportunity to a sub-tenant to appear and be heard at any stage before the Order for recovery of possession is enforced against him and are not restricted to an opportunity of being heard before the Order for recovery of possession was made. It is, I repeat, for him then to show, if he can, that he is a lawful sub-tenant and entitled to the protection of the Control of Rent Ordinance or, in the words of Whyatt, C.J. "entitled to retain possession on any other ground."

In the present case the learned President having found as a fact that there was an express prohibition against sub-letting, whatever rights the respondent might have had against his chief tenants, Messrs. Tong Lee Hin Ltd., he had clearly acquired no rights as a lawful sub-tenant as against the landlords, the present appellants (see the observations of Brown, J. in *Lim Boon Hiok v. Loke Wan Tho*[3]). He could not, therefore, avail himself of the protection of the Control of Rent Ordinance or any other grounds entitling him to retain the possession and the learned President should accordingly, in my view, have dismissed his objection with costs.

Sir Husein Abdoolcader, for the respondent, submitted that the lease itself which prohibited sub-letting, was not signed between the appellants as landlords and Messrs. Tong Lee Hin Ltd. as tenants until the 4th February, 1949, whereas, the tenants had, in fact, been in possession some time prior to that date and had, in fact, sub-let to the sub-tenant, the present respondent, in 1947. On the authority of *Ng Eng Kang v. R. Sitharam & anor.*,[4] he submitted that prohibition could not operate retrospective-

ly. I accept that at once as a correct proposition of the law. But it is apparent from the terms of the written lease itself that although dated the 4th February, 1949, it simply seeks to confirm and record in writing the terms of an oral agreement previously made between the parties in September, 1946, whereby the landlords agreed to execute a lease of the premises according to the terms thereinafter mentioned. One of those terms was covenant against assigning or subletting the premises or any part thereof without the consent in writing of the lessors. It is clear, therefore, that that was the agreement between the parties in 1946, and that the sub-lease to the present respondent was a breach of that agreement.

For these reasons this appeal must be allowed, the judgment of the learned President set aside, and the objection of the respondent to the execution proceedings dismissed. The respondent must pay the costs of these proceedings, both here and in the Court below.

Appeal allowed.

Solicitors: *Hogan, Adams & Allan; H. H. Abdoolcader.*

CHONG FONG KWEE v. KONG GIM HAM
KONG GIM HAM v. CHONG FONG KWEE

[A.C.J. (Rigby J.) October 23, 1958]

[Penang — Civil Appeals Nos. 16 and 17 of 1958]

Landlord and Tenant — Arrears of rent — Decree of possession — Rent "lawfully due" — Meaning of — Difference between Control of Rent Ordinance and English Rent Restriction Acts — Conditional order for recovery of possession — Form of — Appeal and cross-appeal.

Rent shall not be deemed to be in arrears if the tenant proves that it was tendered before due date. To avail the tenant any protection the rent must be tendered before the expiration of the 14 "days of grace" and if it is not so tendered then the landlord is entitled to ask for an order for possession.

The distinction between the local Ordinance and the English Acts is that by virtue of section 12(4) of our Ordinance (section 13(3) of the repealed ordinance) the tenancy must be determined by a notice to quit as condition precedent to an action for recovery of possession on the ground of non-payment of rent, whereas under the English legislation no such notice would appear to be necessary.

When judgment for the recovery of possession is given and the date of recovery of possession is postponed for three months the correct order to make in such a case is a conditional order for possession, but suspended so long as the monthly or weekly rent and the rent in arrears is paid.

Cases referred to:—

(1) *Bird v. Hildage* (1948) 1 K.B. 91.
(2) *Woon Onn v. Tan Yee Gek* (1950) M.L.J. 231.
(3) *Annamalai Chettiar v. Yeoh Kee Tin* (1957) M.L.J. 9.
(4) *Payne v. Cooper* (1957) 3 W.L.R. 741.
(5) *Bayman v. Rowlands* (1957) 1 All E.R. 321 p. 323.
(6) *Dellenty v. Pellow* (1951) 2 All E.R. 716.
(7) *Sherrin v. Brand* (1956) 2 W.L.R. 131.

CIVIL APPEALS, appeals from the Sessions Court.

Lim Cheng Ean for the appellant.

M. Abraham for the respondent.

Cur. Adv. Vult.

Rigby J.: This is an appeal from the judgment of Mr. B. J. Jennings, the then President of the Sessions Court, Penang, granting the respondent, as chief tenant of the premises at No. 521, Penang Road, an Order for possession of that part of the premises sub-let to the appellant, as sub-tenant, on the ground that the appellant was more than 14 days in arrears with his rent. The learned President, however, in the exercise of his discretion under section 12(2) of the Control of Rent Ordinance, 1956, postponed the date of possession for 3 months from the 26th March, 1958, the date of his decision, provided the tenant paid the arrears of rent and the current rent. It is to be observed that that is a postponement of the date of possession for 3 months, subject to the fulfilment of certain conditions and not a suspension of the Order itself for as long as the current monthly rent and the rent in arrears is paid.

There is a separate appeal — which, for the purpose of convenience, I propose to refer to as a cross-appeal — by the respondent against that part of the Order on the ground that the learned President wrongly exercised his discretion in favour of the appellant by postponing the date of possession for 3 months. Since the period of 3 months' postponement had already expired before the cross-appeal was lodged, it is a little difficult to appreciate the object of the cross-appeal.

The appellant's main ground of appeal — and the point was not taken at all before the learned President — is based on the contention that the Court below had no jurisdiction to make